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THE USE OF PROCEDURE TO EFFECT EQUITY: SECTION 1605(b) OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

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The Foreign Sovereign Immunities Act of 1976 (FSIA) was signed into law on October 21, 1976[1] and became effective on January 19, 1977.[2] The purpose of the Act was to codify the restrictive theory of sovereign immunity. The Act attempted to strike a balance between the need to redress wrongs done to an individual[3] by a foreign sovereign in the course of its commercial pursuits and the need to diminish a potential for serious friction in the United States' foreign relations caused by shotgun attachments of the foreign sovereign's assets by the injured party.[4]

Congress addressed this dilemma, as it affects admiralty suits brought to enforce a maritime lien, by enacting section 1605(b). Congress designed section 1605(b) specifically to avoid initiation of a suit[5] by arrest of the vessel or cargo[6] of a foreign sovereign

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1. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1977) [hereinafter cited as FSIA]. In the section-by-section analysis, Congress recognized that prior to the FSIA, the law in the United States did not 1) provide a plaintiff with a means to initiate a suit against a foreign state defendant, 2) provide a standard to be used in a foreign sovereign immunity determination, and 3) provide a method of execution against a foreign sovereign's commercial assets. H.R. REP. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6605 [hereinafter cited as H.R. Rep.].

2. 28 U.S.C. § 1602. *See also* Monroe Leigh, Legal Advisor to the Department of State, to the Attorney General, Department of State Pub. Notice No. 507 (November 10, 1976), *reprinted in* 1976 AMERICAN MARITIME CASES 2362 [hereinafter Leigh].

3. *See* Comment, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148 (1954) [hereinafter cited as *Jurisdictional Immunity*]. Prior to the FSIA, commentators alleged that the courts failed to reconcile the policy of appeasing the sensitivities of foreign governments with the policy of meeting the injured party's needs. *See also* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220 (1951) [hereinafter cited as Lauterpacht]. Professor Lauterpacht argued that the sovereign's perogatives "denie[d] to the individual legal remedies for the vindication of his rights as against the state in the matter both of contract and tort." *Id.* at 220.

4. Jet Line Services, Inc. v. M/V *Marsa El Hariga*, 462 F. Supp. 1165, 1174 (D. Md. 1978). Shotgun attachments are those proceedings in rem by a plaintiff against the various assets of a defendant in order to secure jurisdiction over him, even when these assets did not give rise to the dispute.

5. Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469 (Sup. Ct. N.Y. 1959). The court recognized that a party could have the property of a foreign sovereign attached for jurisdictional purposes, as long as the property was within the United States, of a commercial nature, and the sovereign was not immune.

6. In Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648 (2d Cir. 1979), the court said:

> [I]t might be argued that the general exception to the jurisdictional immunity of a foreign state in § 1605(b) of the Immunities Act which permits enforcement against a "vessel or cargo" would also include freights substituted for the cargo.

through an in rem proceeding. Instead of the traditional in rem proceeding, Congress provided a statutory procedure whereby the court could obtain in personam jurisdiction over the foreign sovereign, and the plaintiff then could have his day in court.[7]

This comment reviews the history of foreign sovereign immunity. It traces its development from absolute immunity to a position of restrictive immunity and then to the codification of the United States' position on foreign sovereign immunity. It discusses how the historical development of sovereign immunity shaped the enactment of section 1605(b). Finally, this comment analyzes the surprisingly few cases which have judicially construed section 1605(b) of the FSIA in light of historical precedent, fundamental policies, and legislative intent.[8] It concludes that judicial construction, by and large, has resulted in equitable resolutions consistent with the purposes of the statute's enactment.

I. HISTORY

Some of the most important court opinions which shaped the sovereign immunity theory were announced in proceedings in rem against ships.[9] Indeed, the "absolute" sovereign immunity theory in the United States originated from *Schooner Exchange v. McFaddon*.[10] The libellant in *Schooner Exchange* premised his suit for attachment on a claim of title and sought the arrest of a foreign public vessel.[11] The Supreme Court held that even though this vessel was within the territory of the United States, it was exempt

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> But the point was not argued and we leave the answer for another day. The analogy is strong, at least, in assessing congressional intent.

Id. at 654 n.6.

7. The basic jurisdiction-conferring provision of the FSIA is § 1330(a) in which the court obtains subject matter jurisdiction over claims against a foreign sovereign once it has been established that the sovereign is not entitled to immunity under sections 1605-07. The FSIA does not, however, "provide a cause of action or dictate substantive rules of liability." Velidor v. L/P/G *Benghazi*, 653 F.2d 812, 818 (3d Cir. 1981).

8. Though § 1605(b) has been in effect for four years at this writing, only the following cases have cited it, and fewer still of these have construed it: *Velidor*, 653 F.2d 812; *Amoco Overseas*, 605 F.2d 648; Comite Assureurs Maritimes Marseilles v. *State of Madhya Pradesh*, No. MCA81-0215 (N.D. Fla. July 13, 1981); China Nat'l Chem. Import & Export Corp. v. M/V *Lago Hualaihue*, 504 F. Supp. 684 (D. Md. 1981); E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294 (N.D. Tex. 1980); Willamette Transport, Inc. v. Companía Anonima Venezolana de Navegacion, 491 F. Supp. 442 (E.D. La. 1980); *Jet Line*, 462 F. Supp. 1165.

9. *Jurisdictional Immunity, supra* note 3, at 1150.

10. 11 U.S. (7 Cranch) 116 (1812).

11. Plaintiffs argued that while on a lawful and peaceful voyage the vessel to which they claimed ownership was forcibly taken under the orders of Napoleon and made a public vessel of France. *Id.* at 117.

from arrest because "[a] foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation." [12]

In fact, the underlying rationale of this decision was an outgrowth of the surviving feudal principle that the king, who personified the State, could do no wrong,[13] and that the exercise of authority of one sovereign over another "indicate[d] either superiority of overlordship or active hostility of an equal,"[14] thereby jeopardizing peaceful coexistence among nations. Consequently, states refrained from exercising jurisdiction over one another.

In *Berizzi Brothers Co. v. Steamship Pesaro*,[15] the Supreme Court extended the doctrine of absolute immunity to cover government-owned merchant ships engaged exclusively in commercial ventures.[16] The Court reasoned that "[a] real sovereign . . . is always sovereign. In none of its activities is it ever subject to a higher human will, individual or collective."[17] Until the twentieth century, the absolute sovereign immunity doctrine had no exceptions in the United States.[18]

Internationally, there had emerged a growing concern for individual rights and public morality,[19] and a recognition of the need to redress individual wrongs arising out of a sovereign's commercial activities.[20] On April 10, 1926, representatives of twenty na-

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12. *Id.* at 137.

13. *See* Chemical Nat'l Resources, Inc. v. Republic of Venezuela, 215 A.2d 864 (Pa.) (Musmanno, dissenting), *cert. denied* 385 U.S. 822 (1966). In his scathing dissent, Judge Musmanno said "the fiction of [absolute] sovereign immunity had [been] carried on for so long and . . . with such reverential fear that even with the demise of its principal beneficiary, the aura of supreme authority still endured because one approaches even a dead lion with a certain sense of respect and awe." *Id.* at 889.

14. *Draft Conventions of the Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. 451, 527 (Supp. 1932) [hereinafter cited as *Draft Convention*].

15. 271 U.S. 562 (1926).

16. "[W]hen the [*Schooner Exchange*] decision was given, merchant ships were operated only by private owners and there was little thought of governments engaging in such operations." *Id.* at 573.

17. *Id.* at 568-69.

18. Introductory note RESTATEMENT OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), at 171 (Tent. Draft No. 2, 1981) [hereinafter cited as RESTATEMENT].

19. Lauterpacht, *supra* note 3 at 250-72. "The restrictive theory appeared in western continental Europe in the latter part of the 19th century." N. LEECH, C. OLIVER, & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 316 (1973) [hereinafter cited as INTERNATIONAL LEGAL SYSTEM].

20. At the World Economic Conference of 1927, the Conference recommended:

> That, when a Government carries on or controls any commercial, industrial, banking, maritime transport or other enterprise, it shall not, in its character as such and in so far as it participates in enterprises of this kind be treated as enti-

tions (but not the United States or the Union of Soviet Socialist Republics) signed the Brussels Convention for the Unification of Certain Rules Concerning the Immunities of State-Owned Ships.[21] This document subjected government-owned merchant vessels that came within the signatory nations' jurisdictions to the same rules of liability as applied to private commercial vessels.

Eventually, serious criticism arose in the United States of the absolute sovereign immunity doctrine as a doctrine that "invade[d] with impunity [individual] rights otherwise protected by the law of the land."[22] United States courts became more sensitive to the changing international attitudes as foreign governments substantially increased their participation in United States and other international commercial markets.[23] Penetration by foreign sovereigns' carriers correspondingly increased the potential injury to the private entrepeneur. In response, the United States courts attempted to restrict the applicability of the absolute sovereign immunity theory.[24]

Traditionally, immunity had been asserted by the foreign sovereign in a special appearance in the United States courts. As the courts attempted to restrict the applicability of immunity, foreign

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> tled to any sovereign rights, privileges or immunities from taxation or from other liabilities to which similar privately owned undertakings are subject, it being clearly understood that this recommendation only applies to ordinary commercial enterprises in time of peace.

Draft Convention, supra note 14, at 607 (citations omitted).

21. *See* E. ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS 303-08 (1933).

22. Lauterpacht, *supra* note 3, at 246. *See also* Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution* 27 MICH. L. REV. 751, 775 (1929).

Mr. Hervey suggested as a solution that international agreements, such as The International Convention on the Transport of Goods by Rail, and the Treaties of Versailles and St. Germain, viable examples of international agreements, be used as patterns to fashion an international agreement—to which the United States should be a party—in which a sovereign who engaged in commercial activity renounced its immunity. As an alternative, he admonished that Congress enact a law

> expressly resuming all jurisdiction which has been impliedly or tacity lost, and if necessary, the establishment of a special tribunal for the interpretation and enforcement of the law, [which] would be in consonance with justice, and would offer the most speedy and effective solution of the 'immunity' difficulties inherent in the commercial undertakings of foreign states.

23. International Economic Report of the President 56 (1975).

24. For jurisdictional purposes, the courts drew distinctions based on possession/non-possession of a vessel, *see, e.g.*, Mexico v. Hoffman, 324 U.S. 30 (1945); The *Katingo Hadjipatera*, 40 F. Supp. 546 (S.D.N.Y.), *aff'd*, 119 F.2d 1022 (2d Cir.) *cert. denied*, 313 U.S. 593 (1941); or incorporation/non-incorporation of a government agency, *see, e.g.*, The *Uxmal*, 40 F. Supp. 258 (D. Mass. 1941); United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929).

sovereigns employed an alternative method to claim immunity and circumvent suit. This alternative method, known as a "recognition and allowance," became common in the early part of this century. A "recognition and allowance" occurred when a foreign sovereign asserted its immunity claim to the Department of State. The Department of State in turn requested the Department of Justice to suggest immunity to the court. The court was required then to recognize the sovereign as immune and dismiss the suit.[25] In effect, the "recognition and allowance" procedure transferred the immunity determination from the judiciary to the State Department. The deference by the courts to the executive branch was mandated by the Supreme Court's opinions in *Ex parte Peru*[26] and in *Mexico v. Hoffman*.[27]

In *Ex parte Peru*, a foreign sovereign's vessel was attached in a breach of contract action. The Republic of Peru filed a claim of immunity which was formally recognized by the State Department and moved the district court for release of the vessel. The court denied the motion holding that the petitioner had waived its immunity by making a general appearance in the suit. On appeal, the Supreme Court held that "[u]pon the submission of this certification [of immunity] to the district court, it became the court's duty . . . to release the vessel and to proceed no further in the cause."[28]

In *Hoffman*, a libel in rem action was brought against the *Baja California*, a vessel operated by a Mexican corporation but owned by the Mexican government. Although the State Department was aware of the government ownership, it would not recognize and allow a claim of foreign sovereign immunity. The Court noted that its actions in the matter could affect the relationship between the State Department and Mexico, but, because the State Department would not enlarge the doctrine, the Court refused to extend the immunity. The Court rationalized its position in *Hoffman* as necessary in order to preclude "embarass[ment to] the executive arm in its conduct of foreign affairs."[29]

Unfortunately, transferring the immunity determination to the State Department relegated the aggrieved individual's right of ac-

25. RESTATEMENT, *supra* note 18, at 172.

26. 318 U.S. 578 (1943).

27. 324 U.S. 30 (1945).

28. 318 U.S. at 589. This judicial deference, according to Chief Justice Stone, was "founded upon the policy . . . that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Id.*

29. 324 U.S. at 35.

cess to the courts to an inferior position. In judicial proceedings, freed from political pressures, the immunity determination could have been made based on an equitable balancing of the parties' interests. As a politically sensitive institution, however, the State Department was more likely to yield to diplomatic pressures brought about to avoid any affront to sovereign prestige. Its goal was to maintain amicable international relations and preclude friction. Individual rights held a secondary role.[30]

After World War II, the State Department realigned its position to conform to the international trend of "restrictive sovereign immunity."[31] The State Department reasoned that it was inconsistent to grant immunity to a foreign sovereign when the United States subjected itself to suit in its own courts. Moreover, the United States, when engaged in commercial ventures overseas, did not claim sovereign immunity in the foreign jurisdiction. And finally, the Department felt that persons engaged in commercial enterprises with a foreign sovereign should be allowed to have their rights determined by the judiciary.[32]

The State Department set forth its official position in a letter from Jack B. Tate, Acting Legal Advisor to the Acting Attorney General.[33] The "Tate letter" classified the acts of a foreign sovereign as either jure imperii or jure gestionis. When a foreign sovereign acted jure imperii, it retained its immunity because its acts were public acts.[34] When it acted jure gestionis, the immunity was forfeited because the acts were classified as private.[35]

Ultimately, Congress codified the restrictive theory in the Foreign Sovereign Immunities Act of 1976.[36] The FSIA returned the

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30. Even when it had been alleged that the State Department acted arbitrarily, the courts refused to review the determination. Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974). Likewise, in *Chemical Nat'l Resources*, 215 A.2d at 869, the court said that the State Department immunity determination "is conclusive no matter how unwise or, in a particular case how unfair or unjust the Department's determination appears to be."

31. RESTATEMENT *supra* note 18, at 172-73.

32. 26 Dept. State Bull. 984, 985 (1952).

33. *Id.* at 984. The Tate letter is reproduced in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711-15 (1976).

34. Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1200 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). In Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 360, the court considered as public acts only those which were:

(1) internal administrative acts, such as expulsion of an alien.
(2) legislative acts, such as nationalization.
(3) acts concerning the armed forces.
(4) acts concerning diplomatic activity.
(5) public loans.

35. INTERNATIONAL LEGAL SYSTEM, *supra* note 19, at 322-33.

36. FSIA, *supra* note 1 at 6605-06. This act has four objectives:

immunity determination to the judiciary,[37] releasing the State Department from the "awkward position of a political institution trying to apply a legal standard to litigation already before the courts [especially when] . . . it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review."[38]

II. 28 U.S.C. § 1605(b)

In establishing the standards for resolving foreign immunity questions, Congress was aware of a national/international tension. It recognized a need to reduce diplomatic irritation (arising from shotgun attachments of assets necessary to obtain jurisdiction over a foreign sovereign), and yet to insure the injured party a forum in which to seek redress.[39] Accordingly, section 1605(b) was drafted to permit a plaintiff to bring suit against a foreign state. This statute was adopted to give the court in personam jurisdiction over the foreign sovereign (which thereby rendered prior attachment of a sovereign's property unnecessary), and, if the sovereign was not immune, to allow the plaintiff to secure an adjudication on his claim.[40]

A. The Sovereign State or Entity

The first case to construe section 1605(b) as it applied to a maritime attachment of a foreign sovereign's vessel was *Jet Line*.[41] Jet

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1. To codify the restrictive immunity theory;
2. To transfer the immunity determination from the executive to judicial branch;
3. To provide for in personam jurisdiction over a foreign sovereign and render unnecessary in rem proceedings against a foreign sovereign's property;
4. To provide for a remedy for a judgment creditor should the foreign sovereign fail to satisfy a final judgment.

37. It was the State Department's intention to limit itself to amicus curiae briefs. Public Notice No. 507 of the Department of State of the United States of America, 41 Fed. Reg. 50883 (1976).

However, commentators questioned whether the State Department would "resist the importunings of foreign governments and whether the courts [would], or lawfully [could], ignore express desires of the State Department" in the future. Brower, Bistline, & Loomis, *The Foreign Sovereign Immunities Act of 1976 In Practice*, 73 AM. J. INT'L L. 200, 206 (1979). *See* Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978).

38. H.R. REP., *supra* note 1, at 6607. *See generally* Martropico Compania Naviera S.A. v. Pertamina, 428 F. Supp. 1035, 1037 (S.D.N.Y. 1977).

39. H.R. REP., *supra* note 1, at 6626. The principle of sovereign immunity had been alleged to have given a foreign sovereign an unfair competitive advantage over private commercial entrepeneurs. The *Cristina*, 1938 A.C. 485, 521-22.

40. Williams v. Shipping Corp. of India, 489 F. Supp. 526, 529 (E.D. Va. 1980), *aff'd*, 653 F.2d 875 (4th Cir. 1981).

41. 462 F. Supp. 1165.

Line Services sought to recover damages for services it rendered in cleaning up oil spills from the M/V *Marsa El Hariga* in August 1977 and from the M/V *Elrakwa* in October of the same year. Jet Line Services intervened in an in rem action in which the *Elrakwa* had been arrested.[42]

At the time of the *Elrakwa*'s arrest, Jet Line also instituted suit against M/V *Marsa El Hariga* and her owner, whom Jet Line erroneously alleged in its complaint to be the National Oil Company of Libya. Jet Line also erroneously alleged that the National Oil Company of Libya had an interest in the *Elrakwa*.[43] The *Elrakwa* was worth $24,000,000. Jet Line sought a maritime attachment and garnishment against it to insure jurisdiction, and ultimately to secure satisfaction of Jet Line's $91,310 claim against the National Oil Company of Libya for cleanup services provided the M/V *Marsa El Hariga*.[44] In fact, the General National Maritime Transportation Company (GNMTC), from 1977 to the date of the suits, had continuously owned both M/V *Elrakwa* and M/V *Marsa El Hariga*. On discovery of its error, Jet Line moved successfully to amend its complaint to name the correct owner.[45]

Because sovereign immunity is an affirmative defense,[46] GNMTC in turn offered prima facie evidence of its immunity[47] in a special appearance before the court. GNMTC moved to dismiss the arrest of the *Elrakwa* claiming the attachment improper and void.[48] The district court granted the motion to dismiss, and held that based on section 1605(b) Jet Line forfeited both its in rem and in personam actions "for all times."[49]

The FSIA initially clothes a "foreign state" with immunity from the jurisdiction of the courts of the United States.[50] The term "for-

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42. Promet Marine Services Corp. v. *Elrakwa*, Civil No. Y-78-62 (D. Md. 1978) cited in 462 F. Supp. at 1166-67.

43. 462 F. Supp. at 1167.

44. Prior to the enactment of the FSIA, the property of a foreign sovereign could not be retained to satisfy a judgment because it had been traditionally immune from execution. Leigh, *supra* note 2, at 2364.

Section 1610 (a) and (b) of the FSIA, however, modified the immunity from execution to conform to the provisions on jurisdictional immunity. H.R. REP., *supra* note 1, at 6626.

45. 462 F. Supp. at 1167.

46. H.R. REP., *supra* note 1, at 6616.

47. GNMTC submitted affidavits, supporting documents from the Department of State verifying an affiant's status, a photocopied page from Lloyd's Register of Ships, and other material. 462 F. Supp. at 1172.

48. *Id.* at 1167.

49. *Id.* at 1177.

50. This section was written "in a manner consistent with the way in which the law of sovereign immunity has developed." H.R. REP., *supra* note 1, at 6616.

eign state" is not limited in meaning to a foreign state per se.[51] When any entity can demonstrate by prima facie evidence that it

> (1) . . . is a separate legal person, corporate or otherwise, and
> (2) . . . is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) . . . is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country,[52]

it falls within the definition of an "agency or instrumentality of a foreign state" and is embraced within the "foreign state" definition. Though GNMTC was not a foreign state per se, in *Carey v. National Oil Corp.*, the court held it to be an "agency or instrumentality of a foreign state."[53]

B. Commercial Activity

Although GNMTC fell within the statutory definition of a foreign state, the grant of immunity was neither absolute nor automatic. Since the shipping activity was of a commercial nature, GNMTC could become subject to the in personam jurisdiction of the United States' courts. The court in *Jet Line*, however, chose not to deal with this distinction.[54]

In *China National Chemical Import & Export Corp. v. M/V Lago Hualaihue*,[55] the court specifically did construe this provision. In *China National Chemical*, the plaintiffs owned and insured a cargo of chemical fertilizer which was being transported from the United States to China on the M/V *Sapporo Olympics*. The vessel, M/V *Lago Hualaihue*, owned by the Empresa Maritima del Estado, a Chilean government merchant marine, collided

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51. *Id.* at 6613. Only under § 1608 does the term "foreign state" refer to the foreign state itself. In all other sections of the chapter, "foreign state" includes political subdivisions, agencies and instrumentalities.

52. 28 U.S.C. § 1603(b) (1976). 28 U.S.C. § 1332(c) and (d) (1976) provides:

> (c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.
> (d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

53. 453 F. Supp. 1097, 1100 n.2 (S.D.N.Y. 1978). The district court found that GNMTC succeeded General Maritime Transport Organization which was a wholly government-owned Libyan entity.

54. 462 F. Supp. at 1172-73.

55. 504 F. Supp. 684 (D. Md. 1981).

with the *Sapporo Olympics* in international waters off Panama, allegedly causing approximately a million and a half dollars of damage. The plaintiffs looked for redress of the maritime tort under section 1605(b).[56] The defendants argued that when Congress wrote the clause "which maritime lien is *based upon* a commercial activity of the foreign state" it did not intend that a maritime tort of this nature be included within section 1605(b); rather, the words "based upon" instead of "in connection with" or "arose out of" limited the jurisdiction of the United States' courts over a foreign state to instances where there was a commercial relationship *between* the plaintiff and the foreign state.[57]

The district court, however, held that Congress did not intend to limit section 1605(b) to those cases in which there is a commercial relationship between the foreign sovereign and the injured party;[58] rather, Congress intended that "the term 'commercial activity' . . . [includes] a broad spectrum of endeavor."[59] Consequently, the operation by a foreign sovereign of a commercial vessel which caused a maritime tort was sufficient to trigger section 1605(b): "Congress intended to allow [a party] . . . to bring an action under § 1605(b) where the alleged maritime tort lien arises out of a commercial activity for a foreign state; e.g., the operation of a commercial cargo vessel as distinguished from the operation of a naval vessel."[60] This distinction appears to be a return to the public versus the private act distinction employed by the State Department prior to the enactment of the FSIA.[61]

The court premised its holding on the analysis of the FSIA. The term "commercial activity" can have two meanings: It could mean "either [1] a regular course of commercial conduct or [2] a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[62]

The term "regular course of commercial conduct" is self-explan-

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56. *Id.* at 686.
57. *Id.* at 689.
58. *Id.*
59. H.R. REP., *supra* note 1, at 6614.
60. 504 F. Supp. at 689.
61. Indeed, this very distinction had been attempted by M. Weiss, a judge of the Permanent Court of International Justice in 1923. "The test . . . is not whether the transaction is aimed at achieving an object directly connected with the political functions of the state as a sovereign entity . . ., the test is whether . . . the juridical nature of the transaction is such that it can be entered into by an individual." Lauterpacht, *supra* note 3, at 225.
62. 504 F. Supp. at 686.

atory; it includes any activity customarily carried on for profit. On the other hand, the meaning of the phrase a "particular commercial transaction or act," is not as readily apparent. In elaborating its views on what is encompassed within the term "transaction or act," Congress asked whether the contract made by a foreign sovereign was of the same character as that which an individual could make. If so, the sovereign's acts are commercial activity regardless of whether the ultimate purpose of the activity is a public purpose.[63]

It was necessary to preclude immunity for a foreign sovereign engaged in commercial activity which had a public purpose because "[i]n a real sense all acts *jure gestionis* are acts *jure imperii*."[64] Otherwise, there would be a reversion to the absolute immunity grant of *Berizzi Brothers*.[65] Moreover, in its section analysis Congress expressly avoided a precise definition of the term "commercial activity," choosing instead to give the judiciary much latitude in its determination.[66]

The coupling of the private-person inquiry with the great leeway accorded the court in defining commercial activity sustains the holding in *China National Chemical*. The result reached is consistent with the congressional intent to narrowly limit foreign sovereign immunity in the economic sphere.

In *Jet Line*, the commercial activity exception to foreign sovereign immunity was applicable because GNMTC was created for the purpose of engaging in all facets of the petroleum business[67]—a regular course of commercial conduct engaged in for profit. Though *China National Chemical* held that it was not necessary to show a commercial relationship between the injured party and the foreign sovereign, a more compelling argument for the applicability of the commercial activity definition could have been made in *Jet Line* because GNMTC had contracted with Jet Line for cleanup services.

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63. H.R. REP., *supra* note 1, at 6615.

64. Lauterpacht, *supra* note 3, at 224.

65. 271 U.S. at 568-69.

66. *See* 653 F.2d at 817 n.7, in which the court said:

> Congress deliberately left the distinction between commercial and governmental activities open for judicial adumbration on a case-by-case basis. The legislative history indicates that if the activity is one in which a private entity could engage, it is not entitled to immunity, even if the contract seeks to procure goods for a governmental purpose.(citations omitted).

67. 462 F. Supp. at 1172.

C. Attachment—Strict vs. Liberal Approach

Although GNMTC had lost its immunity, the court in *Jet Line* held that it did not have jurisdiction over GNMTC. The district court premised its holding on the FSIA's legislative analysis which stated that "[i]f, however, the vessel or its cargo is arrested or attached, the plaintiff will lose his in personam remedy and the foreign state will be entitled to immunity—except in the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved."[68]

Jet Line had contended that neither its president nor any of its corporate officers had knowledge of this Foreign Sovereign Immunities Act and, lacking in-house counsel, had no occasion to be advised of the statute's existence. The court held that ignorance of the Foreign Sovereign Immunities Act was no excuse;[69] Jet Line furnished services to vessels both domestic and foreign, and should have been aware of possible complications arising from its interactions with foreign ships.[70] The court stated that to allow Jet Line to prevail because of its "ignorance" would be to allow an "attach first, ask later" policy which would undermine the policies of the Foreign Sovereign Immunities Act.[71]

Jet Line also claimed, to no avail, that it was unaware that a foreign sovereign was involved. By invoking this safety clause built into the statute, Jet Line tried to salvage the in personam remedy.[72] The court looked to the FSIA legislative analysis, which stated that the use of this clause should be rare, because foreign ownership is easily ascertained from ship registers, the flag of the vessel, or the circumstances giving rise to the maritime lien.[73] The district court pointed out that in *Lloyd's Register of Shipping* GNMTC is listed as the owner of the M/V *Marsa El Hariga* and

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68. H.R. REP. *supra* note 1, at 6620.

69. 462 F. Supp. at 1176. *See, e.g.*, Lawder v. Stone, 187 U.S. 281, 293 (1902).

70. The court reached this conclusion based on Jet Line's complaint which stated that Jet Line was "in the business among other things of furnishing services to merchant vessels." 462 F. Supp. at 1175. The Supreme Court has held that a party which engages in a commercial venture is conclusively presumed to know the law. Mammoth Oil Co. v. United States, 275 U.S. 13, 54 (1927).

71. 462 F. Supp. at 1176. In fact, the court pointed out that the FSIA had been published and had been effective for almost a year prior to the date of the suit. *Id.* Consequently, Jet Line had adequate opportunities to avail itself of knowledge of the contents of the FSIA had it so chosen.

72. Jet Line mistakenly named the National Oil Company as the defendant instead of GNMTC. The court said that, nevertheless, this mistake was not indicative of Jet Line's ignorance of a foreign state's involvement because both entities were organs of the Libyan government. *Id.* at 1175.

73. H.R. REP., *supra* note 1, at 6620-21.

M/V *Elrakwa*, and "GNMTC" are the initials of the General National Maritime Transport Company of Tripoli, Libya. The court was mindful that simply because the company was listed as "of Tripoli, Libya," the designation may not have been dispositive that GNMTC was a foreign sovereign or an instrument thereof. It pointed out, however, that under the heading "GNMTC," the Shipping List of Shipowners also said "See Government of Libya."[74] Hence, Jet Line had imputed knowledge of the foreign sovereign ownership of both vessels. Therefore, the court held that because Jet Line failed to comply with the procedures explained in section 1605(b), it forfeited both its in personam and in rem actions and dismissed the suit.[75]

This holding is in keeping with the legislative intent of balancing the interests of the foreign sovereign against those of the injured party. But for Jet Line's own actions, there would not have been a forfeiture. Jet Line could have availed itself of the information necessary to comply with the statutory procedure. Detaining the *Elrakwa* created unjustifiable inconvenience and expense for the foreign sovereign. In fact, Jet Line's attachment of the *Elrakwa*, by the needless pre-statutory method of initiating a lawsuit, was an example of the "shotgun approach" which Congress wanted to stop in order to reduce diplomatic irritation.[76]

In an unreported case, *Comite Assureurs Maritimes Marseilles v. State of Madhya Pradesh*,[77] the District Court for the Northern District of Florida also took a strict approach, but unlike *Jet Line* did not reach a statutorily justifiable result. In *Comite*, the plaintiff, a foreign insurance company, had issued a policy to cover casualty loss for a large quantity of peanuts which were to be transported on the vessel *State of Madhya Pradesh*. During transport, the peanuts were damaged by fire and water.[78] Alleging negligence, the plaintiff-insuror sought to have the vessel attached and sold to recover the monies for which it had become obligated to its in-

74. 462 F. Supp. at 1176. The court also noted that the ships flew the flag of Libya. Congress cited this as an indication of ownership. H.R. REP, *supra* note 1 at 6620. However, this is subject to question because the flag commonly indicates only nation of registry.

75. *Id.* at 1177.

76. H.R. REP., *supra* note 1, at 6626. The section-by-section analysis is replete with language which evidences congressional intent to preclude attachment as a means of initiating a suit. For example, "[S]ection 1605(b) is designed to avoid arrests of vessels . . . to commence a suit." *Id.* at 6620. "[O]ne of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary." *Id.* at 6626.

77. No. MCA 81-0215 (N.D. Fla., July 13, 1981).

78. Complaint at V, No. MCA 81-0215.

sured. The vessel was attached, but subsequently released on a bond under which The Shipping Corporation of India, Ltd., owner of the *Madhya Pradesh*, assumed liability.[79]

The defendant in rem, *Madhya Pradesh*, and the claimant, The Shipping Corporation of India, Ltd., moved for a dismissal with prejudice. They alleged that Comite, the plaintiff, had forfeited any cause of action it might have had because it improperly seized the *Madhya Pradesh* in violation of the procedures set out in the Foreign Sovereign Immunities Act. In addition, they argued that *Lloyd's Register of Shipping* showed the vessel to be owned by The Shipping Corporation of India, Ltd. and that prior to the plaintiff's seizure of the vessel, Comite had obtained *actual* knowledge of the identity of the seized vessel's owner, through (1) a telephone conversation with Mr. Healy (the president of Lamonte, Burns & Company, Inc., a United States commercial correspondent for the vessel's underwriter) and (2) a telex from Mr. Wood (the attorney representing the vessel's underwriter).[80] In essence, defendants alleged that the clause in section 1605(b) permitting a plaintiff to maintain his in personam action when he could show he "was unaware that the vessel . . . of a foreign sovereign was involved,"[81] was inapplicable.

Plaintiff in turn alleged that prior to the vessel's attachment, he had no "actual knowledge."[82] He contended that the main purpose of the telephone call with Mr. Healy was to further attempt to negotiate security to avoid the arrest of the *Madhya Pradesh*, and that the telex sent him was equivocal because it indicated that Mr. Wood "*understood*," rather than actually knew that the vessel was "owned by the government of India, or an arm or agency thereof."[83]

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79. Release of Vessel, *id.*

80. Motion To Dismiss, *id.* *See also* Supplemental Memorandum In Support of Motion to Dismiss. In addition to the Supplemental Memorandum, the claimant filed the original affidavits of Nicholas J. Healy, Jr., the U.S. commercial correspondent, and Captain Devinder Singh, the defendant vessel's U.S. representative. The defendants contended that Mr. Healy's affidavit, together with the telex from Mr. Wood, which was dated the day before the vessel was attached by the plaintiff, conclusively established that the plaintiff had actual knowledge of the ownership of the vessel by a foreign sovereign. *Id.* Except for these conclusory allegations, the pleadings do not explicitly show how such knowledge is "established."

The affidavit of Captain Singh, the offical United States representative of The Shipping Corporation of India, Ltd., likewise was alleged to have conclusively established that the vessel was owned by an instrumentality of the sovereign foreign state of India. *Id.*

81. H.R. REP., *supra* note 1, at 6620.

82. Memorandum in Opposition to Motion to Dismiss, No. MCA 81-0215.

83. Review of the pleadings reveals that the plaintiffs believed the arrest was necessary

Further, plaintiff contended that it could not be established from information contained in the shipowners register and the ship register that the government of India owned or controlled the corporation which owned the *Madhya Pradesh*.[84] Plaintiff alleged that, in fact, it was not until late in the judicial proceedings that he learned that "the vessel as we now know, [was] apparently not owned by the government of India, but the vessel [was] owned by a corporation whose shares are entirely owned by the foreign sovereign state of India."[85] The plaintiff maintained that he did not forfeit his in personam claim.

The district court granted the motion to dismiss with prejudice, as filed pursuant to section 1605(b).[86] Juxtaposing *Jet Line* to *Comite* in light of congressional intent, it is difficult to understand why the district court in *Comite* reached this result. Section 1605(b) sought to implement new procedures to obtain jurisdiction over a foreign sovereign who caused a wrong in the economic sphere. This section was not meant to deprive an injured party of his substantive rights.[87]

In *Comite,* the ship's registry did not list "*State of Madhya Pradesh*" with those ships owned by the government of India. Rather, *Lloyd's Register of Shipping* listed "*State of Madhya Pradesh*" under the heading, "The Shipping Corporation of India, Ltd." The register failed to state that The Shipping Corporation of India, Ltd. was an instrumentality or agency of the Indian government.[88]

The section-by-section analysis of FSIA states that "evidence that a party had relied on a standard registry of ships, *which did not reveal a foreign state's interest in a vessel,* would be prima facie evidence of *the party's unawareness* that a vessel of a foreign state was involved."[89] Since there was only an "understanding" that the vessel was owned by a foreign sovereign, coupled with the

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because the initial negotiations between the underwriters for the Comite and Mr. Wood were unsuccessful, and the vessel's departure from the jurisdiction was imminent. Affidavit of Julian Bennett, *id.*

84. Memorandum in Opposition to Motion to Dismiss, *id.*

85. Plaintiff contended foreign ownership was not conclusively established until a statement by a representative from the Indian Embassy certifying The Shipping Corporation of India, Ltd. as an organ of the State of India and owner of the *State of Madhya Pradesh* was included with the pleadings on June 17, 1981. Letter of R.N.N. Choudhury, *see id.*

86. Order, *id.*

87. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on HR 11315 Before the Subcommittee on Administrative and Governmental Relations of the House Judiciary Committee,* 94th Cong., 2d Sess. 69 (1976).

88. 1980-1981 LLOYD'S REGISTER OF SHIPPING 305-06.

89. H.R. REP., *supra* note 1, at 6621 (emphasis added).

fact that the ship registry neither designated the government of India as the owner nor designated the shipping corporation as wholly-owned by India (unlike *Jet Line* in which under the heading, "GNMTC," the registry said "See Government of Libya") the court, by a literal interpretation of the statute, could have found in personam jurisdiction under the exception in section 1605(b)(1).[90]

Moreover *Comite*, unlike *Jet Line*, did not involve the mischief which the statute was designed to remedy—shotgun attachments of a variety of foreign sovereign assets to initiate suit. Rather, the only asset that was attached was the very asset which gave rise to the tort.

In light of the statute's purpose, its history, and the social and economic factors which gave rise to its enactment, there is no reason why the district court could not have rendered a decision opposite that which it rendered. Though the court premised its holding on *Jet Line*, its resolution, unlike the resolution in *Jet Line*, worked a penalty on a plaintiff who was not feigning ignorance of foreign sovereign ownership.

In *Velidor v. L/P/G Benghazi*,[91] the Court of Appeals for the Third Circuit focused on congressional purpose when seamen, who wanted to press a wage claim against the owner of the vessel, failed to comply with the formal process standards of section 1605(b)(2).

In *Velidor* the plaintiffs, who were Yugoslavian seamen on board the L/P/G *Benghazi*, became dissatisfied with the manner in which they were paid by the owner of the *Benghazi*, Compagnie Algero-Libyenne de Transport Maritime (CALTRAM), an instrumentality of the Algeria/Libya governments. While at sea, the seamen radioed CALTRAM that they wanted to be relieved of duty and paid in full all wages due and owing when the ship arrived in Camden, New Jersey.[92]

When the ship reached Camden, the seamen brought suit because CALTRAM did not make the payments which the seamen alleged were due them under the Seamen's Wage Act.[93] To prevent the vessel from leaving the port, they successfully sought to have

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90. Even if *Comite* had not fallen within the letter of the statute, the court could have looked to the spirit of the statute in order reach this result. "A large number of American decisions, and especially the modern cases, have subscribed to the doctrine extending or restricting the literal expression of a statute according to the spirit and policy of the legislation." J. SUTHERLAND, STATUTORY CONSTRUCTION § 54.03 (4th ed., 1973).

91. 653 F.2d 812 (3d Cir. 1981).

92. *Id.* at 814.

93. The Seamen's Wage Act was enacted to insure (1) that the seamen would not be denied their wages and turned ashore to become public charges, and (2) to equalize the operational costs of vessels both foreign and domestic. 653 F.2d at 818-19.

the vessel arrested.

At a hearing on March 17, 1980, CALTRAM established itself as an instrumentality of a foreign sovereign and sought immunity under FSIA. The court released the *Benghazi* from arrest, but ruled that it had in personam jurisdiction over CALTRAM under section 1605(b) of the FSIA.[94]

On April 3, 1980, CALTRAM moved to have the March 17 order vacated and the complaint dismissed because the plaintiffs did not comply with both notice provisions of section 1605(b).[95] Section 1605(b)(1) requires delivery of notice to the person having possession of the vessel, and section 1605(b)(2) requires that notice must be given to the foreign sovereign itself in compliance with the provisions set out in section 1608(b)(2).[96]

40 D 6262 Realty Corp. v. United Arab Emirates Government,[97] interpreted the notice requirement of section 1608. In *40 D 6262 Realty Corp.*, the petitioners had attached a copy of the "notice of petition" to the premises of the foreign sovereign and in addition had mailed a copy of the petition to the Permanent Mission of the United Arab Emirates Government. The district court held that this was not a permissible manner of service under section 1608.[98]

Section 1608 requires that there be transmitted a "notice of the suit," rather than "notice of the petition." Further, the transmitted summons and complaint must be in the official language of the foreign sovereign.[99] The legislative rationale was that

> [a] "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with

94. 653 F.2d at 814-15.

95. *Id.* at 816.

96. 28 U.S.C. § 1608(b)(2) (1976) states that:

> (b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:
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> . . .
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> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents . . . .

97. 447 F. Supp. 710 (S.D.N.Y. 1978).

98. *Id.* at 711.

99. *Id.*

U.S. law or procedures.[100]

The court said that "[u]ntil proper service is effected,"[101] it did not have jurisdiction to hear the case. Nevertheless, the court appeared willing to entertain the suit in the future since it instructed the "petitioners . . . [to] proceed to serve respondent in accordance with the requirements of 28 U.S.C., section 1608."[102]

The *Jet Line* court said in dicta, citing *40 D 6262 Realty Corp.*, that "[t]he Immunities Act would allow an in personam action for a maritime lien *only as long as* the provisions for notice under Section 1605(b)(1) and (2) are followed."[103]

The plaintiffs in *Velidor* admitted that they gave notice only to the master of the *Benghazi*.[104] Nevertheless, the court skirted this omission. It would not dismiss the suit; instead, it found jurisdiction under section 1605(a)(2).[105] It read section 1605(b) restrictively, holding that the second notice prong, sending a summons and complaint to the foreign sovereign itself, related only to maritime liens arising under section 1605(b). It found the master of the *Benghazi* to be the agent of the owner, and notice to the agent to be notice to CALTRAM.[106] Consequently, there was the requisite service of process and subject matter jurisdiction over the dispute that gave the district court in personam jurisdiction.[107]

This holding, unlike *Comite,* used procedure effectively to implement the underlying purpose of the FSIA. It refused "to impose on plaintiffs a procedural burden at odds with the avowed congressional desire to expand the means of serving process on the instrumentalities of foreign sovereigns."[108] The ruling of the court on service of process provided an injured party a forum for redress.

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100. H.R. REP., *supra* note 1, at 6623.
101. 447 F. Supp. at 712.
102. *Id.*
103. 462 F. Supp. at 1177 (emphasis added).
104. 653 F.2d at 816.
105. *Id.* at 815, 821. 28 U.S.C. § 1605 (1976) provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

106. 653 F.2d at 821.
107. *Id.* at 817.
108. *Id.* at 817.

III. Conclusion

The history of foreign sovereign immunity evidenced an early predisposition toward providing the foreign sovereign with a shield from suit. As societies developed, and the rights of the individual were recognized, limitations were placed on the immunity of sovereigns who engaged in commercial ventures.

In the United States, 28 U.S.C. § 1605(b) was enacted to free a sovereign's assets from shotgun attachments and yet provide the injured individual access to the courts. While case law construing this section is minimal, it appears that there are two approaches to the procedural formalities specified by statute. While these approaches may appear to conflict, in fact they do not. They reflect instead an underlying balancing of competing interests made by the judiciary in an atmosphere freed from the political pressures exerted by the executive branch.